JUDGMENT OF THE COURT (Sixth Chamber)
30 November 1995 *

In Case C-175/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Court of Appeal, London, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte **John Gallagher,**

on the interpretation of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117),

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch, G. F. Mancini, F. A. Schockweiler and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: M. B. Elmer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— John Gallagher, by Robin Allen QC, Peter Duffy and Tim Eicke, Barristers, instructed by Stephen Grosz, Solicitor,

— the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, David Pannick QC and Mark Shaw, Barrister,

— the Commission of the European Communities, by Christopher Docksey, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of John Gallagher, the United Kingdom and the Commission at the hearing on 13 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 12 October 1995,

gives the following

Judgment

1 By order of 10 February 1994, received at the Court on 24 June 1994, the Court of Appeal referred for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117, hereinafter 'the directive').

2 The questions arise in proceedings brought before the Court of Appeal by Mr Gallagher against the order made by the Secretary of State for the Home Department (hereinafter 'the Secretary of State') to exclude him pursuant to section 7(1) and (2) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (hereinafter 'the Act').

3 Section 7 of the Act provides as follows:

'(1) If the Secretary of State is satisfied that any person —

(a) is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies; ...

The Secretary of State may make an exclusion order against him.

(2) An exclusion order under this section is an order prohibiting a person from being in, or entering, the United Kingdom.'

4 Schedule 2 to the Act allows a person to make representations in respect of an exclusion order. Paragraphs 3 and 4 of Schedule 2 are worded as follows:

'3. — (1) If after being served with notice of the making of an exclusion order the person against whom it is made objects to the order he may —

(a) make representations in writing to the Secretary of State setting out the grounds of his objections; and

(b) include in those representations a request for a personal interview with the person or persons nominated by the Secretary of State under subparagraph (5) below.

...

(5) If a person exercises those rights within the period within which they are required to be exercised by him, the matter shall be referred for the advice of one or more persons nominated by the Secretary of State.

...

4. — (1) Where the Secretary of State receives representations in respect of an exclusion order under paragraph 3 above he shall reconsider the matter as soon as reasonably practicable after receiving the representations

and any report of an interview relating to the matter which has been granted under that paragraph.

(2) In reconsidering a matter under this paragraph the Secretary of State shall take into account everything which appears to him to be relevant and in particular —

(a) the representations relating to the matter made to him under paragraph 3 above;

(b) the advice of the person or persons to whom the matter was referred by him under that paragraph; and

(c) the report of any interview relating to the matter granted under that paragraph.

...'

5 Mr Gallagher, an Irish national, was sentenced in Ireland in 1983 to three years imprisonment for possession of two rifles for unlawful purposes. Between May 1987 and September 1989 he travelled to the United Kingdom to look for work. He did in fact work in the United Kingdom between April 1990 and September 1991.

6 Mr Gallagher was arrested on 24 September 1991 pursuant to section 14 of the Act. On 27 September 1991, he was served with an exclusion order drawn up

under section 7 of the Act on the ground that the Secretary of State was satisfied that Mr Gallagher was 'concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland'.

7 Following his removal, Mr Gallagher raised objections against the exclusion order in accordance with paragraph 3(1) of Schedule 2 to the Act. He made representations in writing to the Secretary of State setting out the grounds of his objections and requested a personal interview with a person nominated by the Secretary of State. This interview took place in the British Embassy in Dublin on 6 December 1991. During the interview, the person nominated by the Secretary of State did not reveal his identity and did not provide any information on the grounds of exclusion. The Secretary of State reconsidered the case pursuant to paragraph 4 of Schedule 2 to the Act but did not alter his decision.

8 Mr Gallagher instituted proceedings challenging the exclusion order, the refusal to revoke it, the nomination of the adviser with whom he had had the interview and the decision not to reveal the adviser's identity. On appeal, Mr Gallagher argued in particular that, contrary to the requirements of Article 9 of the directive, he had been excluded from the United Kingdom before he could even make representations against the exclusion order or meet the person nominated by the Secretary of State. He also contended that this person was, by virtue of the manner of his appointment, not competent to deliver the opinion required under Article 9 of the directive.

9 Because of uncertainty as to the interpretation of Article 9, the Court of Appeal decided to submit the following questions to the Court for a preliminary ruling:

'1. Does Article 9 of Directive 64/221 of 25 February 1964 prohibit the Secretary of State for the Home Department from making an exclusion order under sec-

tion 7 of the Prevention of Terrorism (Temporary Provisions) Act 1989 before receiving the opinion of a competent authority when the relevant provisions of Schedule 2 to the 1989 Act provide that

(a) an individual who is the subject of such an order is entitled to make representations to a competent authority and

(b) if such representations are made, the Secretary of State is obliged to consider the opinion of that competent authority and is obliged to reconsider the merits of making an exclusion order prior to the removal of the individual from the United Kingdom (unless the individual otherwise consents to removal from the United Kingdom)?

2. Does the fact that a person is appointed by the Secretary of State for the Home Department prevent that person from being a competent authority for the purpose of Article 9 of Directive 64/221 of 25 February 1964?'

10 In its questions, the Court of Appeal refers to Article 9 of the directive, without specifying whether it is seeking a ruling on the interpretation of Article 9(1) or Article 9(2).

11 In its observations, the Commission submitted that, since United Kingdom legislation concerning Irish nationals does not require them to hold a residence permit in order to reside in the United Kingdom, the decision to exclude an Irish national working in the United Kingdom who does not hold a residence permit falls within the scope of Article 9(1) of the directive. At the hearing, the United Kingdom agreed with this interpretation.

12 Article 9 of the directive provides as follows:

'1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.'

13 It is clear from the wording of Article 9 of the directive that paragraph (1) concerns a decision to expel a person holding a residence permit from the territory of a Member State, while paragraph (2) concerns a decision to expel a person prior to the issue of such a permit.

14 It follows that Article 9(1) covers the case of a national of a Member State who is already lawfully residing within the territory of another Member State. That

includes a person holding a residence permit, but also a national of another Member State who, according to the legislation of the host State, is not required to hold a residence permit. Article 9(1) therefore also applies to a decision to expel such a national from the territory of a Member State.

The first question

15 The essence of the first question referred by the Court of Appeal is whether Article 9(1) of the directive is to be interpreted as meaning that the opinion of the competent authority may be given after the decision to expel the person concerned has been taken, on the understanding that, if the person concerned raises an objection, the administrative authority responsible for the decision is required, save in cases of urgency, to reconsider the decision in the light of that opinion.

16 It is settled law that the object of Article 9(1) of the directive is to ensure minimum procedural safeguards for persons affected by a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit. That provision, which applies where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, envisages the intervention of a competent authority other than the authority empowered to take the decision. In proceedings before that competent authority the person concerned must enjoy such rights of defence and of assistance or representation as are provided for by the domestic law of that country (see, in particular, Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgium* [1990] ECR I-3763, paragraph 62).

17 As the Court has already held, the purpose of the intervention of the competent authority referred to in Article 9(1) is to enable an exhaustive examination of all

the facts and circumstances, including the expediency of the proposed measure, to be carried out before the decision is finally taken (Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665, paragraph 15, and Case 131/79 *Regina* v *Secretary of State for Home Affairs*, ex parte *Santillo* [1980] ECR 1585, paragraph 12). The Court has also ruled that, save in cases of urgency, the administrative authority may not take its decision until an opinion has been obtained from the competent authority (Case 98/79 *Pecastaing* v *Belgium* [1980] ECR 691, paragraph 17, and *Dzodzi*, paragraph 62).

18 According to the United Kingdom, the purpose of Article 9(1) of the directive is met if the person concerned is able to exercise the rights set out in that provision. In the present case, it argues, the Act allows individuals who are the subject of an exclusion order to make representations to a competent authority and requires the Secretary of State, where appropriate, to examine the opinion of that authority and to reconsider the merits of his decision before the individual concerned is removed from the territory of the United Kingdom.

19 That argument cannot be accepted.

20 As the Advocate General has observed at point 19 of his Opinion, the distinction between Article 9(1) and Article 9(2) is precisely that, in situations covered by Article 9(1), the opinion must be obtained before the decision is taken, whereas in situations covered by Article 9(2) the opinion is obtained after the decision has been taken and only at the request of the person concerned, if he has raised objections.

21 If Article 9(1) were to be construed as the United Kingdom suggests, the distinction between the rule in Article 9(2) and the rule in Article 9(1) would be lost.

22 The answer to the first question must therefore be that Article 9(1) of Directive 64/221 must be interpreted as meaning that, save in cases of urgency, it prohibits the administrative authority from taking a decision ordering expulsion before a competent authority has given its opinion.

The second question

23 By the second question referred, the Court is asked to rule whether Article 9(1) of the directive precludes the competent authority referred to in that provision from being appointed by the same administrative authority as takes the decision ordering expulsion.

24 The directive does not specify how the competent authority referred to in Article 9 is appointed. It does not require that that authority be a court or be composed of members of the judiciary. Nor does it require the members of the competent authority to be appointed for a specific period. The essential requirements are, first, that it be clearly established that the authority is to perform its duties in absolute independence and is not to be directly or indirectly subject, in the exercise of its duties, to any control by the authority empowered to take the measures provided for in the directive and, second, that the authority follow a procedure enabling the person concerned, on the terms laid down by the directive, effectively to present his defence (*Dzodzi*, paragraph 65, and *Adoui and Cornuaille*, paragraph 16). It is for the national court to determine in each case whether those requirements have been met.

25 As regards the form of the opinion of the competent authority, the objectives of the system provided for by the directive require that the opinion be duly notified to the person concerned, but the directive does not require the opinion to identify by name the members of the authority or indicate their professional status (*Adoui and Cornuaille*, paragraph 18), since such identification is relevant only for the purpose of enabling the national court to determine whether the members of the authority are independent and impartial.

26 The answer to the second question must therefore be that Article 9(1) of the directive does not preclude the competent authority referred to in that provision from being appointed by the same administrative authority as takes the decision ordering expulsion, provided that the competent authority can perform its duties in absolute independence and is not subject to any control by the authority empowered to take the measures provided for in the directive. It is for the national court to determine in each case whether those requirements have been met.

Costs

27 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Court of Appeal, London, by order of 10 February 1994, hereby rules:

1. Article 9(1) of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health must be interpreted as meaning that, save in cases of

urgency, it prohibits the administrative authority from taking a decision ordering expulsion before a competent authority has given its opinion.

2. Article 9(1) of Directive 64/221 does not preclude the competent authority referred to in that provision from being appointed by the same administrative authority as takes the decision ordering expulsion, provided that the competent authority can perform its duties in absolute independence and is not subject to any control by the authority empowered to take the measures provided for in the directive. It is for the national court to determine in each case whether those requirements have been met.

Kakouris Hirsch Mancini

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 30 November 1995.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber